

Senate Bill 337
March 14, 2013
Presented by Bill Schenk
House Judiciary Committee

Mr. Chairman and committee members, I am Bill Schenk, Legal Counsel for the Montana Department of Fish, Wildlife and Parks (FWP). I am here today on behalf of the Director in opposition to SB Bill 337.

SB 337 would amend the statute that defines who has standing to request a hearing on an objection to water right claims at the Montana Water Court. Section 85-2-233, MCA broadly allows objection. For example, anyone who requests a copy of a decree may object. But it then says that there must be good cause shown for an objector to be entitled to a hearing.

Currently, Section 85-2-233(1)(b), MCA defines "good cause shown" as a written statement showing that a person has an ownership interest in water or its use that has been affected by the decree. SB 337 would delete "in water or its use" and substitute "an existing water right, permit, certificate, or state water reservation under 85-2-316.

SB 337 is an attempt to undo a 2011 Montana Supreme Court decision. In Montana Trout Unlimited v. Beaverhead Water Co., the Court found that Montana Trout Unlimited had standing to request a hearing on objections to water right claims in the Big Hole basin. The heart of the ruling was that the phrase "ownership interest in water or its use" is broader than actual ownership interest in a water right claim. The Court concluded that "based upon the State's ownership of the waters of Montana which it holds in public trust for the benefit of its people, and the undisputed specific interests of the members of TU in the Big Hole River Basin that MTU – under the facts of this case – has a sufficient ownership interest in water or its use to demonstrate 'good cause' " to require the Water Court to hold a hearing on TU's objections.

The decision is too long to discuss in great detail, but it is worth noting that the Court considered a broad range of factors in reaching its decision. For example, the Court noted that under the public trust doctrine and the Montana Constitution the public owns an instream, non-diversionary right to the recreational use of the State's navigable waters. The Court also looked at the adjudication statutes and the water right adjudication rules and concluded that as a whole, the entire adjudication process was set up to be inclusive. In fact, it pointed to a previous Water Court decision in which the Water Court had adopted a "broad-tent" policy with respect to considering objections to water compacts.

SB 337 is unlikely to have a major impact on the adjudication but FWP opposes it for several reasons. First, FWP believes there is a fear that because those who do not own water rights are entitled to hearings on their objections, the adjudication will be bogged down with objections by the recreating public and the organizations that represent them. This hasn't happened. The adjudication has been ongoing for over thirty years and no such delay has occurred to this point. There is simply no evidence to suggest that anglers and paddlers are filing lots of objections.

Second, the Court did say that its interpretation of the word ownership does not expand the right to be heard on an objection to every person in the state. An objector would still have to show good cause to be entitled to a hearing. Under the current definition, in order to be entitled to a hearing, an objector must demonstrate both an ownership interest in water or its use and, that the use has been affected by the decree. In other words, the same individual who shows injury because of her history of floating and fishing the Big Hole may not be able to show that she would be affected by the decree of the Tongue River.

Most importantly, objectors play an important role in the adjudication. When Montana opted for a judicial adjudication of pre-1973 water rights, it was generally thought that adverse parties would help ensure its accuracy. People are often reluctant to object to their neighbors water rights. Therefore, FWP's objections play an important role. Because there are basins where FWP has no instream water rights that may be reexamined before final decrees can be entered – particularly west of the Continental Divide, FWP maybe not be able to play its important role as an institutional objector. More objections, and more participation by adverse parties results in a more accurate adjudication. In the long run, this is in the best interest of all Montana water users.

Finally, SB 337 may create more questions than it answers. For example, would organizations whose members own water rights be entitled to a hearing? Conversely, would individuals with water contracts from a state or private irrigation project be able to object? Ultimately, given the recreating publics' constitutional interests cited by the Court, would the amended statute be constitutional?

FWP believes that there are few objections from parties that don't own water rights causing delays in the adjudication, but where an organization or individual can show that he or she could be affected by a decree then he should not be able to participate. Therefore, FWP opposes SB 337.